COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF PUBLIC UTILITIES

Investigation by the Department of Public Utilities on its own Motion into Rate Structures that will Promote Efficient Deployment of Demand Resources	D.P.U. 07-50-A

ATTORNEY GENERAL'S MOTION FOR CLARIFICATION AND RECONSIDERATION

I. INTRODUCTION

On June 22, 2007, the Department of Public Utilities ("Department") opened an investigation into rate structures and revenue recovery mechanisms that may reduce disincentives to the efficient deployment of demand resources in Massachusetts. *Investigation into Rate Structures*, D.P.U. 07-50 (2007). In opening the investigation, the Department requested comments on a decoupling straw proposal to provide guidance, foster consideration of an appropriate mechanism and focus the scope of the proceeding. *Id*., pp. 3, 10. The Department conducted six days of hearings through panel question and answer sessions organized by designated topic. The Department described these hearings as "legislative style" hearings. Hearing Transcript ("Tr."), Vol. 1 at p. 2. On July 16, 2008, the Department issued an Order in *Investigation by the Department of Public Utilities on its own Motion into Rate Structures that will Promote Efficient Deployment of Demand Resources*, D.P.U. 07-50-A ("Decoupling Order"). Pursuant to 220 C.M.R. § 1.04(5) and Department precedent, the Attorney General seeks reconsideration and clarification of the Decoupling Order. The Attorney General asks the Department to clarify or reconsider its decision to permit the termination of

long-term rate plans and clarify the process for implementing recovery of Lost Base Revenues ("LBR"), as well as the decisional status of the Order itself.

II. STANDARD OF REVIEW

A. Clarification

The Department may clarify previously issued Orders when an Order is silent as to the disposition of a specific issue requiring determination in the Order or when the Order contains language that is so ambiguous as to leave doubt as to its meaning. *Boston Edison Company*, D.P.U. 92-1A-B, p. 4 (1993). Clarification does not involve re-examining the record for the purpose of substantively modifying a decision. *Boston Edison Company*, D.P.U. 90-35-A, p. 3 (1992), *citing Fitchburg Gas & Electric Light Company*, D.P.U. 18296/18297, p. 2 (1976).

B. Reconsideration

The Department may grant a motion for reconsideration if its treatment of an issue was the result of mistake or inadvertence. *Massachusetts Electric Company*, D.P.U. 90-261-B, p. 7 (1991). The Department also may grant reconsideration of previously decided issues when extraordinary circumstances dictate that the Department take a fresh look at the record for the express purpose of substantively modifying a decision reached after review and deliberation. *North Attleboro Gas Company*, D.P.U. 94-130-B, p. 2 (1995); *Boston Edison Company*, D.P.U. 90-270-A, pp. 2-3 (1991). A motion for reconsideration should bring to light previously unknown or undisclosed facts that would have a significant impact on the decision already rendered. It should not attempt to reargue issues considered and decided in the main case. *Commonwealth Electric Company*, D.P.U. 92-3C-1A, pp. 3-6 (1995).

III. ARGUMENT

A. The Department Should Reconsider Its Decision to Permit the Early Termination of Long Term Rate Plans.

1. THE DEPARTMENT'S PREMATURE TERMINATION OF LONG-TERM RATE PLANS IS ARBITRARY AND CAPRICIOUS AND DENIES CUSTOMERS THE POTENTIAL FULL BENEFITS OF SUCH PLANS.

In the Department's attempt to implement its decoupling paradigm, it takes a radical turn at the end of its Order by allowing Companies under long-term rate plans the option of breaking such plans. Order, p. 83. The Department initially indicates its desire to implement Decoupling with the sanctity of current long-term rate plans, specifically those companies operating under Performance Based Rate ("PBR") Plans. Order, p. 39. The Order states that it will not force the termination of a currently effective PBR rate plan prior to the end of its term, recognizing that PBRs are designed and implemented to control costs, increase efficiency and keep distribution companies out of rate cases for longer periods of time. Order, p. 49. In recognizing the need to maintain existing long-term rate plans, the Department appropriately recognizes that the balance struck between ratepayers and shareholders through a litigated, long-term rate plan should remain in place.

Despite this well reasoned language at the beginning of the Order, the Department at the end of the Order provides that, for those utilities whose rate plans are not the result of settlements, it "will allow the voluntary termination of a rate plan prior to the end of its term in order to implement Decoupling." Order, p. 83. Three of the Commonwealth's utilities are

operating under long-term PBR Plans that are the result of litigated rate cases: Berkshire Gas Company, Bay State Gas Company, and Boston Gas Company. Allowing these companies the option of terminating long-term rate plans is arbitrary and capricious and denies customers the full benefits of such plans. In the Decoupling Order, the Department provides no evidentiary or legal support for its position that these PBR plans can be altered in the manner proposed. Furthermore, allowing companies under rate plans to file Decoupling proposals before those plans terminate will harm customers, negating any potential beneficial effects of Decoupling as set out by the Department. The Department should reconsider its decision to permit early termination of long-term rate plans for these three utilities.

The terms of the rate plans of the three gas distribution companies at issue here were fixed for a period of ten years by filed tariffs or final Department Orders. *See, e.g.*, Bay State Gas Company M.D.T.E. No. 68 ("The PBR Plan shall continue for a term of ten consecutive years, with the first adjustment effective November 1, 2006.") *incorporated by reference* 220 C.M.R. §1.10(3); *KeySpan Gas Company*, D.T.E. 03-40 (2005) (ten-year rate plan); and *Berkshire Gas Company*, D.T.E. 01-56 (2001) (ten-year rate plan). A company operating under a PBR is prohibited from filing a new rate case until the expiration of the plan except under specific exigent economic circumstances which are not implicated by the Department's Decoupling order. *Bay State Gas Company*, D.P.U. 07-89 (2008). The Department is not free to modify the terms of these approved plans in the manner proposed by giving companies the discretion simply to terminate them early and file new rate cases and new tariffs. Allowing companies to terminate rate plans without justification in order to meet or accelerate a policy objective is arbitrary and capricious and implicates the principles of the filed rate doctrine,

namely that rates and tariffs once filed and approved at the Department remain in force for the duration of a rate plan.[1] *See Bay State Gas Company*, D.T.E. 05-27, p. 431 n. 246 (2005) (The requirements of G.L. c. 164, § 94 embody the principles of the "filed rate doctrine.").

Unlike traditional cost of service rates which are set in a rate case and remain unchanged, perhaps indefinitely, until a company decides to file for new rates, PBR plans are complex formula rates which adjust annually for a preset number of years. *Bay State Gas Co.*, D.T.E. 05-27, pp. 360-404 (2005). In establishing the PBR mechanism for distribution companies, the Department found that "well-designed incentive mechanisms should provide utilities with greater incentives to reduce costs than currently exist under traditional cost of service regulation and should result in benefits to customers, whether in the form of lower prices or increased service**,** which are greater than would be present under current regulation." *Boston Gas Company*, D.P.U. 96-50, p. 242 (1996) *citing Incentive Regulation*, D.P.U. 94-158, pp. 54-55 (1995). Each variable set in the PBR formula is supported by detailed studies or economic theories, so that the entire plan represents an interconnected whole. The PBR formula is designed to compensate the company on an ongoing basis for the fact that it may not simply file for a new rate case during the plan. For example, a company automatically increases distribution rates to reflect inflation and can collect exogenous cost adjustments, *KeySpan Gas Company*, D.T.E. 05-66 (2005), something unavailable to a company operating under a traditional cost of service model without the burden of filing a rate case. The plans may also be designed to consider and compensate a company for relative productivity. The Department specifically

1 "The rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any context." *Louisville & Nashville Rail Company v. Maxwell*, 237 U.S. 94, 97 (1915); *see also Nantahala Power & Light Company v. Thornburg*, 476 U.S. 953 (1986).

requires longer term PBR plans to permit companies "to implement long-term business strategies that could produce significant cost savings and other benefits to ratepayers and shareholders." *Bay State Gas Company* D.T.E. 05-27, p. 400. Furthermore, it has specifically recognized and compensated the utilities for the higher investment risk associated with these long-term rate plans by increasing their base rates by the higher cost of common equity. *See e.g. Bay State Gas Company*, D.T.E. 05-27, p. 303 (2005); and *Boston Gas Company*, D.T.E. 03-40, p. 365 (2003).

Breaking long-term rate plans eliminates the potential for cost savings for customers, and in fact, harms them for the higher costs of equity that they have had to pay. PBR plans are intended to provide the Company with an incentive to operate efficiently and to reduce regulatory burden. *Incentive Regulation*, D.P.U. 94-158, p. 66; *Boston Gas Company*, D.P.U. 96-50 (Phase I), p. 320 (1996); *Berkshire Gas Company*, D.T.E. 01-56, p. 10 (2001). The Department carefully establishes the starting rates and rate mechanisms to provide for these efficiencies and to carefully balance the interests of both the shareholders and customers. Allowing a utility to determine whether it will terminate its long term plan early, and propose a different rate making method, undermines these principles, and will deprive customers of the full benefits of the PBR plans. For example, any investment that a utility has made since the beginning of the PBR plan, beyond that which is embedded in rates through the plan itself (See Bay State Gas Company, D.P.U. 07-89), would not have been reflected in base rates until the end of the plan, yet the option to file a new rate case would allow a company reap a windfall by "updating" its plant-in-service and depriving customers of the benefits of several years of

depreciation that the company would have to absorb under the existing PBR plans.[2] The Department should not switch methodologies in the middle of a long-term plan to the detriment of customers, *see generally Duquesne Light Company,* 488 U.S. 299 (1989), an outcome that will be avoided if the Department leaves the long-term rate plans in tact**.**

2. PROVIDING THE COMPANIES A UNILATERAL OPTION TO TERMINATE EXISTING RATE PLANS PLACES THE INTERESTS OF SHAREHOLDERS OVER THOSE OF CUSTOMERS.

Without justification, reasoning or the constraints of any preconditions, the Department has allowed three utilities that function under the terms of fully litigated, long-term rate plans to effectively pick or choose to continue through its end or terminate the plan and file a new rate case, which may include, but is not limited to, a Decoupling mechanism. Where a company has a unilateral option to remain under its long-term plan or file a new rate case with a Decoupling mechanism, this choice inevitably will be evaluated and based primarily on shareholder interests, not customer interests.

When setting rates, the Department may not focus on investor rights to the derogation of customer interests. The Department is required to balance the interests of customer and investors when setting rates. "The consumer interest cannot be disregarded. . ." in the setting of rates. *Federal Power Commission v. Natural Gas Pipeline Company*, 315 U.S. 575, 607 (1942). The Decoupling Order provides no justification for breaking long-term rate plans and provides

2 To the extent that the option to file a new rate case permits a company to collect any cost previously represented in base rates, it also violates the rule against retroactive ratemaking. *Towns of Concord, Norwood, & Wellesley v. Federal Energy Regulatory Commission*, 955 F.2d 67, 71 n. 2 (D.C. Cir. 1992). The companies have already been

no opportunity for ratepayers to challenge a company's proposal to do so.[3] Under the Decoupling Order, a Company must merely notify the Department of its intent to break its rate within 45 days of the decision. The unilateral option to break a long-term rate plan disregards customer interests in favor of the interests of shareholders.

In addition to placing the interests of shareholders over those of customers, the Department authorization to break current long term-rate plans is not necessary to implement Decoupling in Massachusetts. The Department has recognized that Decoupling will take at least through 2012 to implement. Furthermore, long-term rate plans have mechanisms to allow Companies recovery for costs associated with new regulatory, judicial or legislative changes.[4] There is no evidence that the utilities cannot be adequately compensated for mandates of the Green Communities Act through the existing provision of the long-term PBR Plans or through other transitional mechanisms offered by the Department.

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compensated for the additional risks of long-term PBR Plans. *See Boston Gas Company*, D.T.E. 03-40, p. 365 (2003).

3 The Department distinguished rate plans that were obtained through settlement requiring agreement of all the signatories to the Settlement before the plan can be terminated. Order, p. 83. In requiring the assent of signatories to a Settlement, the Attorney General and other parties that agreed to the terms of an agreement have the ability to assess a company's proposal to initiate a new rate cases and presumably, object or negotiate its terms to ensure ratepayer interest and other non-shareholder interests are protected. This logic should be extended to intervenors in litigated rate cases. While not signatories, intervenors have a substantial and direct interest in the litigated proceeding and Department decision. A decision to subsequently void that decision should likewise require notice and assent of the intervenors in the underlying case.

4 A change in the Department's regulatory policy on Lost Base Revenues that had cost consequences may require adjustment of the PBR rates under the Departments definition of an "exogenous cost." *Eastern Enterprises and Colonial Gas Company*, D.T.E. 98-128, p. 55 (1999).

B. Implementation of Lost Base Revenue Mechanisms Requires A Section 94 Proceeding.

The Department's Order to extend Lost Base Revenue (LBR) recovery to electric utilities reverses existing precedent that banned electric companies from LBR recovery. *See Fitchburg Gas and Electric Company*, D.T.E. 98-48-Phase I, p. 8 (1999)[5.] Assuming without conceding that the Department has provided a sufficient rationale for its policy change, the Decoupling Order fails to acknowledge that a Section 94 proceeding is needed to establish this new reconciling mechanism. The Attorney General urges the Department to clarify that in order for electric utilities to recover LBRs, a Section 94 proceeding is mandatory.

Although the Department through the Decoupling Order establishes a policy to allow Massachusetts utilities to adopt Decoupling, it recognizes that the process by which Decoupling will be implemented through rate cases will take time. *See* Order p. 84. To accommodate for the period prior to full implementation of Decoupling, the Department adopts a transition approach. *Id*., p. 82. It explains that "[a] key component of this approach is the short-term use of LBR [lost base revenue] recovery," and that it would allow "***electric*** distribution companies . . . to recover LBR resulting from their incremental efficiency savings" during the transition period.[6] *Id.* pp. 83, 88 (footnotes omitted) (emphasis supplied).[7] The Decoupling Order states that "[b]eginning in 2009 and extending through the term of their initial three-year energy efficiency plans (i.e., through 2012), ***electric*** distribution companies will be allowed to recover LBR resulting from

5 In *Fitchburg Gas and Electric Company*, the Department denied the utility's request for LBR recovery after finding that it was "no longer necessary to induce a distribution company to undertake voluntary energy efficiency programs that are mandated under the Restructuring Act."

6 Department also stated that "[g]as distribution companies, which currently are allowed recovery of LBR, may continue to do so through the term of their initial three-year energy efficiency plans (i.e., through 2012) consistent with existing LBR recovery methods." *Id.* pp. 83-84.

their incremental efficiency savings."[8] *Id.* p. 83 (footnotes omitted) (emphasis supplied).

LBR recovery is the collection of distribution rate shortfalls from customers that result from implementation of energy efficiency measures via utility-administered energy efficiency programs. The Department has explained that "[b]y implementing conservation programs, a company loses revenues that were allowed in a base rate proceeding to cover historic test-year costs without experiencing a corresponding reduction in these costs." *Cambridge Electric Light Company/Commonwealth Electric Company*, D.P.U. 93-15/16, p. 4 (1993). "LBR recovery provides a way to make up this shortfall." *Id.*

Under the LBR cost recovery rate mechanism, customers incur additional distribution charges through rates to pay for the distribution shortfall. Recovery of the shortfall is therefore governed by G.L. c. 164, § 94. *Cf. Cambridge Electric Light/Commonwealth Electric Co,* D.P.U. 93-15/16 (1993) (reviewing LBR and energy efficiency proposal under G.L. 164, § 94). LBRs, like other cost recovery tariff formulas "cannot be changed outside the hearing procedure mandated by G.L. c. 164, § 94." *Fitchburg Gas and Electric Light Company v. Department of Telecommunications and Energy*, 440 Mass. 625, 638 (2004). This safeguard has long been the rule in Massachusetts. *Consumers Organization for Fair Energy Equality, Inc. v. Department of Public Utilities,* 368 Mass. 599, 606-07 (1975).

Despite clear previous precedent, the Decoupling Order fails to acknowledge that a Section 94 proceeding is needed in order for an electric utility to recover LBRs. In the Decoupling Order, the Department outlines basic filing requirements for a petition to recover

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7 A utility that obtains Department approval for recovery of LBRs may only do so until the distribution company begins operating under a Decoupling plan. *Id.* pp. 83-84, Footnotes 24 and 25.

8 Department also stated that "[g]as distribution companies, which currently are allowed recovery of LBR, may continue to do so through the term of their initial three-year energy efficiency plans (i.e., through 2012) consistent

LBRs. It states that "[a]n electric distribution company that seeks to recover LBRs must petition the Department to do so in conjunction with the filing of its 2009 energy efficiency plan" and "such filing must include full documentation and explanation of (1) how the incremental energy efficiency savings will be achieved and accounted for, and (2) the proposed LBR calculation." *Id.* Nowhere does the Decoupling Order address rate recovery requirements or the need for a full adjudicatory proceeding to review the anticipated LBR proposals. The Department's Order implies that companies may file an LBR recovery request within an energy efficiency proceeding, akin to a compliance filing. Energy efficiency plan proceedings have not included the necessary process for review of LBR proposals or rate recovery which requires a full adjudicatory rate case proceeding pursuant to G.L. c. 164, § 94.

Electric companies do not currently have rate mechanisms for recovery of LBRs in place because the Department barred electric utilities from collecting LBRs over the past decade. Now that the Department has changed its policy, new tariffs must be filed, notice of the rate changes must be issued and a hearing must occur before electric utilities collect LBRs from customers through rates. *See* G.L. c. 94, § 164. Given that LBR recovery proposals will have a rate setting impact, the law entitles customers to a full adjudicatory proceeding which is necessary to preserve due process.[9] *See* G.L. c. 30A, §§ 10, 11. Without clarification of the Department's Order, the uncertainty in the filing requirements and process could certainly breed confusion and unnecessary litigation, and delay in the implementation of both the Department's new policy to implement LBRs during the transition period as well as the approval of the 2009 energy

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with existing LBR recovery methods." *Id.* pp. 83-84.

9 The Department must deem the charges for LBR recovery as just and reasonable before companies can collect the charges for LBRs from customers within the proceeding. *See* G.L. c. 164, § 94; see also id. *See* G.L. c. 30A, §§ 10, 11.

efficiency plans themselves.

C. The Commission Should Clarify Whether the Decoupling Order is a "Final Order."

In the Decoupling Order, the Department reaches conclusions and makes findings adopting full decoupling mechanisms, including the specific mechanics, for all Massachusetts gas and electric distribution companies and sets a goal of implementing decoupling for all companies by 2012. Order, p. 87-88. The Department's findings are made based upon its "review of the written comments and comments made by participants in the panel hearings." Order, p. 87. The Department is free to announce policy decisions in a generic docket, *i.e.* that the State's utilities can file Decoupling proposals. However, its ability to choose a specific methodology absent a factual record and evidence is suspect.[10] Any Decoupling proposal subsequently filed is subject to the standard of review of G.L. c. 164, § 94, which requires that rates be just and reasonable. Absent a precise explanation of the methodology as applied to the facts of a case, there is no way to determine whether the Department has been arbitrary or unreasonable. The burden of demonstrating that a particular Decoupling proposal and its mechanics results in just and reasonable rates is on the utility filing the Decoupling proposal. Whether this specific methodology is just and reasonable depends on the record evidence of that

10 The Department has broad discretion to depart from established policy after a specific finding that such changes are within the public interest. *Deacon Transportation, Inc. v. Department of Public Utilities*, 388 Mass. 390, 395-396 (1983); *New England Telephone & Telegraph Company v. Department of Public Utilities*, 372 Mass. 678, 680 (1977); *see also Western Massachusetts Bus Lines, Inc. v. Department of Public Utilities*, 363 Mass. 61, 63-64 (1973); *Alemeida Bus Lines, Inc. v. Department of Public Utilities*, 348 Mass. 331, 344 (1965). "[T]he requirement of 'reasoned consistency' in *Boston Gas Company v. Department of Public Utilities*, 367 Mass. 92 (1975), means that any change from an established pattern of conduct must be explained." *Robinson v. Department of Public*

future proceeding. While the Department may have jurisdiction to implement Decoupling within current legal and statutory parameters, "it should reserve specific comment on any particular proposal, because there may be jurisdictional issues that are fact-specific to a proposal." *Incentive Regulation*, D.P.U. 94-158, p. 11 (1995). It is not "necessary or appropriate for the Department to endorse a particular incentive mechanism in this proceeding." *Id.* In a generic proceeding, the Department is limited to setting forth its broad policy on Decoupling and the general types of approaches to Decoupling that would satisfy the Department's public policy objectives. *Id.*, p. 12. The burden is upon the utility in a subsequent rate proceeding to demonstrate that its Decoupling proposal is consistent with the Department's goal of "provid[ing] a framework that ensures that the utilities it regulates provide safe, reliable, and least-cost service." *Incentive Regulation*, D.P.U. 94-158 p. 52, *citing* Notice of Inquiry at p. 1, *Mergers and Acquisitions*, D.P.U. 93-167-A at p. 4.

The Order's "findings" imply that a specific Decoupling methodology has been established as just and reasonable and creates the impression that the Decoupling Order is a final Order of the Department, barring further inquiry and testing in subsequent rate cases. Whether the Department's Order is final or not directly affects a party's appellate rights and will provide participating parties with guidance on whether they will have subsequent opportunities to present testimony and other evidence, engage in discovery and cross examine witnesses to test the Department's conclusions in 07-50-A in subsequent adjudicated rate cases to ensure, overall, that the actual application of the Department's policy will result in just and reasonable rates. Without clarification from the Department on whether its Order is final, parties are left to guess whether

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Utilities, 416 Mass. 668, 673 (1993). "It does not mean that the DPU may never deviate from its original position."

they will have to raise issue with such findings in the instant case or will have an opportunity to test the Department's applied policy in the context of a company specific rate cases where the impact of the Department's policy can be fully evaluated on customers' rates.

While the Order appears final in many respects, it contains no notice of a participating party's right to appeal. G.L. c. 25, § 5; 220 C.M.R. § 1.13. A final Order of the Department provides such notice. *Id*. If the Department considers the Order to be a final Order on any issue, it needs to clarify this for the participants in this proceeding. Otherwise, the Attorney General assumes that the Decoupling Order will not bar her from fully reviewing the Department's methodologies and policy goals in the context of an adjudicated rate case.

Id. However, the Department must set forth a statement of reasons for the decision.

IV. CONCLUSION

The Department should allow this request to clarify and reconsider the issues raised in this motion.

Respectfully submitted,

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